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No. 90-1975

In The

Supreme Court of the United States

October Term, 1991

CARRIE ANGELA LATTARULO,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Georgia

RESPONDENT'S RESPONSE IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Did the Georgia Supreme Court properly apply state law to determine whether the results of a test of Petitioner's breath were admissible in evidence in a prosecution of Petitioner for driving under the influence of alcohol or drugs?

II.

Is the statutory definition of the term "alcohol concentration" an evidentiary presumption?

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to this proceeding.

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RESPONDENT'S RESPONSE IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Comes now the STATE OF GEORGIA, Respondent in the above-styled action, by counsel, Michael J. Bowers, Attorney General for the State of Georgia, and prays that this Court deny the Petition for Writ of Certiorari to the Supreme Court of Georgia.

OPINIONS BELOW

The opinion of the Supreme Court of Georgia of which review is sought is reported at 261 Ga. 124 (1991).

The opinion is attached to Petitioner's Petition for a Writ of Certiorari as an appendix.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3), which was repealed in 1988. Pub. L. 100-352, § 3. It appears that jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1257(a), granting this Court jurisdiction to consider, by writ of certiorari, the validity of a state statute drawn in question on the ground of its being repugnant to the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

Set forth in the Petition for Writ of Certiorari is U.S. Const. Amend. XIV, § I.

STATEMENT OF THE CASE

As set forth in the opinion of the Supreme Court of Georgia, a police officer stopped Petitioner after determining that she had been speeding. When Petitioner got out of her car, the officer noticed that she was unsteady on her feet, that her speech was slurred, that her breath smelled of alcohol, that her clothing was in disarray, and that her face was flushed. He observed four or five empty beer bottles on the front floorboard of her car. The officer

arrested Petitioner and charged her with speeding and driving under the influence.

Subsequent to the arrest, Petitioner was given a chemical test of her breath to measure the amount of alcohol in her system. That test disclosed that Petitioner's breath contained an alcohol concentration of 0.19 grams per 210 liters of breath.

Petitioner was tried in the State Court of Houston County (under Georgia law, state courts are granted jurisdiction over, *inter alia*, the prosecution of misdemeanor criminal charges). At the conclusion of trial, Petitioner was convicted of the driving under the influence and speeding charges.

Petitioner appealed her convictions to the Georgia Court of Appeals. In accordance with Georgia's allocation of jurisdiction between its appellate courts, the Court of Appeals transferred the appeal to the Georgia Supreme Court, which considered the appeal and issued an opinion affirming the convictions on February 28, 1991. The Supreme Court denied a Motion for Reconsideration on March 27, 1991.

REASONS WHY THE WRIT SHOULD BE DENIED

A. THE GEORGIA SUPREME COURT PROPERLY APPLIED STATE LAW IN CONCLUDING THAT SCIENTIFIC EVIDENCE OF PETITIONER'S ALCOHOL CONCENTRATION WAS ADMISSIBLE, AND THAT DETERMINATION PRESENTS NO FEDERAL QUESTION FOR REVIEW.

In the Petition, Petitioner initially challenges the determination of the Supreme Court of Georgia that

scientific evidence of Petitioner's alcohol concentration was admissible. The court's determination was based upon the provisions of O.C.G.A. § 40-6-392(a)(1), which provides that the results of a state-administered chemical test of blood, breath, urine, or other bodily substances "shall be admissible" if the test is performed in accordance with methods approved by the Division of Forensic Sciences of the Georgia Bureau of Investigation. The court concluded that, as a matter of state law, the methods utilized in obtaining a chemical test of Petitioner's breath in the case at bar had been performed according to methods approved by the Division of Forensic Sciences. The court then concluded that, pursuant to the state statute, the results were admissible. Appendix, at 5. *See also Brannan v. State,* 261 Ga. 128 (1991), wherein the court held that the admissibility of such test results "is controlled solely by O.C.G.A. § 40-6-392. . . . " *Id.*

Petitioner claims that the due process clause of the United States Constitution is violated by the decision of the George Supreme Court to allow the admission of scientific evidence without proof of its reliability and scientific acceptance. In essence, Petitioner asserts that the decision of the District of Columbia Circuit Court of Appeals in *Frye v. United States,* 293 F. 1013 (D.C. Cir. 1923) establishes a rule of constitutional dimension regulating the admissibility of scientific evidence. However, this is simply not the case. The *Frye* test is simply an application of common law principles in a federal criminal case to determine whether certain evidence is admissible.

Although many states have adopted that test, it is not the law in Georgia. *Caldwell v. State,* 260 Ga. 278, 285, 393

S.E.2d 436 (1990); *Harper v. State*, 249 Ga. 519, 525, 292 S.E.2d 389 (1982). Questions surrounding the admissibility of scientific evidence are a matter of criminal procedure determined by the laws of the various jurisdictions, rather than a matter of federal constitutional law. Indeed, *Frye* is not even universally applied by the federal circuit courts of appeals. *See, e.g., United States v. Downing*, 753 F.2d 1224, 1232-33 (3rd Cir. 1985); Giannelli, "The Admissibility of Novel Scientific Evidence: *Frye v. United States*, A Half-Century Later," 80 Colum. L. Rev. 1197, 1201-02 (1980).

Some commentators have taken the position that *Frye* has been abandoned subsequent to the adoption of the Federal Rules of Evidence. *See, e.g.*, 3 J. Weinstein & N. Berger, Weinstein's Evidence, § 702[03] at 702-16; 22 C. Wright & K. Graham, Federal Practice & Procedure § 5168, at 86-90 (1978). Thus, the *Frye* test is not even a universally followed principle of common law, much less a constitutional requirement.

Moreover, careful reading of Petitioner's contentions discloses that they are misplaced. Petitioner's argument is premised upon her contention that non-compliance with the *Frye* test results in a due process violation by permitting use of an evidentiary presumption relieving the State of its burden of proof, relying upon *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985).

However, *Francis* is inapplicable for a very simple reason: *Francis* prohibits the use of an evidentiary presumption that has "the effect of relieving the state of its burden of persuasion beyond a reasonable doubt of every

essential element of a crime." Francis, at 313 (emphasis added). Omitted from the quoted language in the Petition is the fact that *Francis* is limited in its application to charges to the jury. More important, however, the prohibition against evidentiary presumptions prohibits the state from using such a presumption to avoid its burden of proof as to an essential element of a crime. Of course, satisfaction of the *Frye* test prior to admission of scientific evidence is not an essential element of the crime of driving under the influence defined by Georgia law. As noted by the Georgia Supreme Court, although O.C.G.A. § 40-6-391(a)(4) is worded so that at first blush it appears to create a presumption, it in fact does not do so. Appendix, at 2. Rather, O.C.G.A. § 40-6-391(a)(4) prohibits (a) the operation of a motor vehicle in the State of Georgia while (b) having an alcohol concentration of .12 grams or higher. Thus, the statutory provision for admissibility is not a prohibited evidentiary presumption.

Finally, the state court concluded, notwithstanding the statutory provision, that the scientific evidence in question tendered by the State was in fact based upon accepted scientific theory or rested upon the laws of nature and therefore was admissible upon compliance with the statutory requirements. Appendix, p. 5. The court found that, independent of the statutory requirements, the proffered evidence satisfied Georgia's common law rule of evidence for the admissibility of scientific evidence. Respondent submits, therefore, that the admission of the results of a scientific test of Petitioner's breath to determine its alcoholic content did not deprive Petitioner of due process of law.

B. THE CHARGE TO THE JURY WAS NOT VIOLATIVE OF DUE PROCESS.

Petitioner's argument in support of the second question which she presents is confined to a single paragraph in the Petition. In vague and conclusory fashion, Petitioner alleges that the court's charge as to the statutory definition of the term "alcohol concentration" required the jurors to presume certain facts, violating the court's decision in *Francis*. However, the trial court's charge is not set forth anywhere in the Petition or in the Appendix, nor does Petitioner demonstrate that the charge was objected to on this ground below in order to preserve this alleged error for review. Respondent contends that in the absence of such a showing, there is simply nothing for this Court to consider, and that this ground presents no basis for the grant of certiorari.

Under Georgia law, the term "alcohol concentration" is defined as the grams of alcohol per 100 milliliters of blood or per 210 liters of breath. O.C.G.A. § 40-1-1(1). The State was required to adopt a standardized definition by the federal government. Uniform Standards for State Highway Safety Programs, 23 C.F.R. § 1204.4, p. 486. Nothing in this statute creates a presumption of any sort, and in the absence of the verbatim charge given by the trial court in the Appendix, as well as any objections lodged thereto by Petitioner, Respondent contends that the Court should deny the Petition as to this ground.

CONCLUSION

O.C.G.A. § 40-6-392(a)(1), which prescribes the conditions under which the results of scientific tests of a defendant's blood, breath, urine, or other bodily substance may be admitted in evidence in the State of Georgia, does not deprive criminal defendants of due process of law. The Georgia Supreme Court properly applied the State's rules of evidence in concluding that this evidence was admissible. The conclusion that evidence is admissible is not an evidentiary presumption which excuses the State from proof of any essential element of the crime charged. The Petition contains an inadequate basis for the Court to consider Petitioner's claims that the trial court's charge to the jury was deficient. Respondent therefore respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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